No. 93-714

IN THE
Supreme Court of the United States

October Term, 1993

U.S. BANCORP MORTGAGE COMPANY,
Petitioner,
v.
BONNER MALL PARTNERSHIP,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the new value exception to the absolute priority rule survived enactment of the Bankruptcy Reform Act of 1978, permitting the debtor in a Chapter 11 bankruptcy case to confirm a nonconsensual plan of reorganization that allows the debtor's equity holders to retain ownership of the reorganized debtor while paying objecting creditors less than the full amount of their claims.

LIST OF PARTIES

The petitioner is U.S. Bancorp Mortgage Company. The parent corporation of U.S. Bancorp Mortgage Company is U.S. Bancorp. U.S. Bancorp is also the parent corporation of U.S. Bank of Oregon, U.S. Bank of Washington, and U.S. Bank of California. U.S. Bancorp Mortgage Company has no subsidiaries.

Respondent is Bonner Mall Partnership.

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OPINIONS BELOW

On December 6, 1991, the United States Bankruptcy Court for the District of Idaho decided to grant U.S. Bancorp Mortgage Company ("U.S. Bancorp") relief from the automatic stay to foreclose on the sole significant asset of Bonner Mall Partnership ("Bonner"). The Bankruptcy Court's Memorandum of Decision is unofficially reported at 1991 Bankr. LEXIS 1402, 1991 WL 330784, and 91 Idaho Bankr.

Ct. Rep. 187 and is reprinted at J.A. 29-33.[1] The Bankruptcy Court entered a separate Order Denying Motion to Dismiss and Granting Motion for Relief from Stay on December 11, 1991. The United States District Court for the District of Idaho reversed the Bankruptcy Court's decision on July 15, 1992 and entered a further Correction Order on July 23, 1992. The District Court's Opinion and Order, as corrected, is reported at 142 B.R. 911 and reprinted at Pet. App. A86-115. That Order was affirmed by the Court of Appeals for the Ninth Circuit pursuant to an Opinion and separate Order filed and entered on August 4, 1993. The Court of Appeals' Opinion is reported at 2 F.3d 899 and reprinted at Pet. App. A1-82.

JURISDICTION

This proceeding arises under the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (as amended, the "Bankruptcy Code" or "Code"), 11 U.S.C. § 101, *et seq.* (1993).[2] The date of the decision of the Court of Appeals for the Ninth Circuit is August 4, 1993. U.S. Bancorp's Petition for Writ of Certiorari was filed on November 2, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISION INVOLVED

Section 1129 of the Bankruptcy Code provides in relevant part:

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1 A related August 23, 1991 Memorandum of Decision of the Bankruptcy Court was inadvertently printed in place of the December 6, 1991 Memorandum of Decision in the parties' previously filed appendices. *See* Pet. App. A116-27; Resp. App. A1-7.

2 Unless otherwise indicated, all statutory references in this brief are to Title 11 U.S.C.

(a) The court shall confirm a plan only if all of the following requirements are met:

. . . .

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

. . . .

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

. . . .

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.

STATEMENT OF THE CASE

This case concerns the ability of Bonner's equity holders to retain their ownership of the Bonner Mall (the "Mall"), a shopping center located in Bonner County, Idaho. The Mall was built by Northtown Investments using a $6.3 million loan from First National Bank of North Idaho. Northtown Investments signed a note and a deed of trust on the Mall. U.S. Bancorp acquired the note and deed of trust in 1986.

1. Bonner is an Idaho general partnership that was formed for the purpose of acquiring and operating the Mall. On October 31, 1986, Bonner purchased the Mall from Northtown Investments, subject to U.S. Bancorp's lien on the Mall. The Mall is Bonner's only significant asset.

The Mall turned out to be a bad investment and, on July 10, 1990, U.S. Bancorp commenced a nonjudicial foreclosure of the Mall because of Bonner's default under the deed of trust on the Mall. U.S. Bancorp agreed to three requests by Bonner to postpone the foreclosure sale of the Mall, finally resetting the sale for March 14, 1991. On March 13, 1991, Bonner filed a petition under Chapter 11 of

the Bankruptcy Code, staying the foreclosure. *See* § 362(a). Bonner is a debtor-in-possession pursuant to Sections 1101 and 1107.

2. On April 23, 1991, U.S. Bancorp moved for relief from the automatic stay, *see* § 362(d), to foreclose its interest in the Mall on the ground, among others, that Bonner could not confirm a plan of reorganization. On August 23, 1991, the Bankruptcy Court denied relief, subject to the proviso that Bonner propose a plan of reorganization that was not unconfirmable as a matter of law. Pet. App. A127. The Bankruptcy Court also valued the Mall at $3.2 million. *Id.* at A126.

On October 31, 1991, Bonner filed its First Amended Plan of Reorganization (the "Plan") and related First Amended Disclosure Statement. Under the Plan, which is reprinted at J.A. 2-28, Bonner would transfer all of its assets to a new entity, Bonner Properties, Inc. ("Bonner Properties") in return for Bonner Properties' assumption of Bonner's liabilities as set forth in the Plan.

The Plan provided that the $3.2 million portion of U.S. Bancorp's claim that is fully secured by the Mall would be paid 32 months after the Plan's confirmation, with 7% annual interest payable monthly in the interim.[3] J.A. 11, § 5.3.1.1. Other secured creditors also would be paid the value of their collateral on a deferred basis. J.A. 12-17, §§ 5.3.2-.5. No cash whatsoever would be distributed with respect to the more than $3.6 million in unsecured claims against Bonner, including the undersecured portion of U.S.

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[3] Unless U.S. Bancorp exercised its election under Section 1111(b) of the Code, in which case U.S. Bancorp would retain its lien and its entire allowed claim, without interest, would be paid over a period of not less than thirty years. *See* J.A. 12, § 5.3.1.2.

Bancorp's claim which constitutes approximately 93% of all unsecured claims. Instead, all unsecured claims of more than $1,000 would be satisfied through a pro-rata distribution of 300,000 shares of Bonner Properties redeemable preferred stock having an aggregate par value and liquidation preference of $300,000. J.A. 17, 19-20, §§ 5.4.1, 7.3. The preferred stock would be convertible after the final payment of the secured portion of U.S. Bancorp's claim into 15% of the then-outstanding shares of Bonner Properties common stock. J.A. 19-20, § 7.3. The preferred stock could be redeemed at Bonner Properties' option at par. *Id.*

Under the Plan, Bonner's existing partners would contribute to Bonner Properties $200,000 cash and a 32-month undertaking to fund any shortfall in Bonner Properties' working capital in return for 2,000,000 shares (100%) of Bonner Properties common stock. J.A. 19, § 7.2. The Plan would give Bonner's partners the exclusive right to acquire the common stock, except for the 300,000 shares that could be issued to unsecured creditors upon the conversion of the preferred stock.

The Plan does not meet the requirement of Section 1129(b)(2)(B)(i) of the Bankruptcy Code, *see supra* p. 4, because the holders of more than $3.6 million of unsecured claims are to receive only $300,000 in liquidation value of preferred stock. Accordingly, the Plan can only be confirmed in a "cramdown" under Section 1129(b) of the Bankruptcy Code if Section 1129(b)(2)(B)(ii) is satisfied. The requirement of Section 1129(b)(2)(B)(ii) embodies what is known as the "absolute priority rule." The Plan appears to violate the absolute priority rule because Bonner's owners will retain property under the Plan, despite the failure to pay unsecured

claims in full.[4] The Plan therefore can be confirmed only if there is an exception (or corollary) to the absolute priority rule that permits a debtor's owners to contribute new value to the reorganized debtor in return for the property they receive or retain under the plan of reorganization. Bonner relies on such a "new value" exception or corollary to the absolute priority rule to confirm the Plan.[5]

3. In response to Bonner's Plan, U.S. Bancorp renewed its motion for relief from stay to foreclose on its interest in the Mall or for dismissal of the case. *See* RA 11. U.S. Bancorp argued that the Bankruptcy Code does not permit any new value exception to the absolute priority rule and, in the alternative, that if the exception existed, the Plan does not satisfy its requirements as a matter of law. RA 12, at 6-11.

The Bankruptcy Court agreed with U.S. Bancorp's first argument and therefore did not reach the second. J.A. 33. The Bankruptcy Court observed that a new value exception under the Bankruptcy Act of 1898 was described in dicta in *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106 (1939), and that this Court had expressly declined to decide whether the exception survived under the Bankruptcy Code in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197 (1988).

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4 Whether the Plan actually does violate the absolute priority rule is an open question under the decision below. *See* Pet. App. A35-43.

5 The Plan has been amended in various regards since the Court of Appeals' decision, but still relies on the new value exception.

J.A. 31-32 & n.5.[6] In rejecting the exception, the Bankruptcy Court adopted the reasoning of *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 948 F.2d 134, *withdrawn in relevant part on reh'g and republished as amended*, 995 F.2d 1274 (5th Cir. 1991) (per curiam) (Jones, J., dissenting from withdrawal), *cert. denied*, 113 S. Ct. 72 (1992), and *In re Outlook/Century Ltd.*, 127 B.R. 650 (Bankr. N.D. Cal. 1991). J.A. 32.

The District Court reversed in reliance on this Court's decision in *Dewsnup v. Timm*, 112 S. Ct. 773 (1992), *see* Pet. App. A110-11, which was issued after the Bankruptcy Court's ruling, and apparently found support for its decision in the Fifth Circuit's withdrawal in part of the *Greystone* decision, *see* Pet. App. A114-15. The District Court reasoned, in light of *Dewsnup* and the District Court's interpretation of the policy underlying Chapter 11, that Congress did not intend to repeal pre-Code practice regarding the new value exception. Pet. App. A111-16. The District Court refused to address the issue whether the Plan satisfies the requirements of the new value exception and remanded to the Bankruptcy Court for that purpose. Pet. App. A116-17.

The Court of Appeals for the Ninth Circuit affirmed the District Court's decision on August 4, 1993. *See* Pet. App. A1-84.[7] The Court of Appeals based its affirmance on

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6 See Argument I of the Brief of the California Bankers Association and the American Bankers Association (hereinafter, the "CBA and ABA") as *Amici Curiae* in Support of Petitioner for the history of the new value exception.

7 The Court of Appeals determined as a preliminary matter that the District Court's decision was a final order for purposes of 28 U.S.C. § 158(d) (1993). *See* Pet. App. A10-19.

four primary grounds: (1) qualifying new value plans do not violate the absolute priority rule because they give old equity a stake in the reorganized debtor on account of its new value contribution, not on account of its old equity interests, Pet. App. A33-51;[8] (2) Congress' failure to express a clear intent to abandon the new value exception dictates its continued viability, Pet. App. A51-61; (3) Congress' overhaul of the reorganization process does not vitiate the existence of the new value exception, Pet. App. A61-71; and (4) the new value exception is consistent with the policies of Chapter 11, Pet. App. A71-79. The Court of Appeals concluded by remanding the case to the Bankruptcy Court with instructions to consider the feasibility of Bonner's Plan under the new value exception. Pet. App. A81-82.

SUMMARY OF THE ARGUMENT

This case involves "the troublesome phase of construction" in which the Court must determine "the extent to which . . . external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 529 (1947). Specifically, the Court must decide whether the "absolute priority rule," which requires that senior creditors be paid in full before junior creditors and interest holders get any property in a cramdown, contains the "new value exception" described in *Case v. Los Angeles Lumber Prods. Co.*, 308 U.S. 106 (1939). U.S. Bancorp submits that the new value exception was extinguished by Section

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8 The Court of Appeals identified five requirements for a qualifying new value plan: Value that is "1) new, 2) substantial, 3) money or money's worth, 4) necessary for a successful reorganization and 5) reasonably equivalent to the value or interest received." Pet. App. A37 (citing *Los Angeles Lumber*, 308 U.S. at 121-22).

1129(b)(2) of the Bankruptcy Code, the plain language of which provides **without exception** that holders of junior claims and interests may not receive any property under a plan of reorganization unless all senior classes of claims consent to or are unimpaired under the plan. While it is true that Congress did not write the Bankruptcy Code on a clean slate, in completely overhauling the plan confirmation process Congress wrote the new Code with such clarity that it is unnecessary, improper, and ill-advised to refer to what was erased in construing what was enacted.

Accepted rules of Bankruptcy Code construction demonstrate that the new value exception did not survive enactment of the Code. This Court has set forth the applicable method of Bankruptcy Code construction in a line of decisions in which pre-Code practice was claimed to inform Bankruptcy Code interpretation. Those decisions, of which *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989), is the exemplar, hold that the plain meaning of a Code section is controlling unless the plain meaning is intrinsically suspect or extrinsically called into question, such as where there is a clearly contrary expression of legislative intent, a conflicting provision in the Code, or an important, antagonistic, and long-recognized nonbankruptcy policy. *See, e.g., Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494 (1986). A different or conflicting pre-Code practice alone, however, is not sufficient to justify rejection of the plain meaning of a Bankruptcy Code section. *Dewsnup v. Timm*, 112 S. Ct. 773, 779 (1992). Thus understood, pre-Code practice is a potent tool for the interpretation of ambiguous Code sections, and in those instances where the plain meaning of a section is cast in doubt, but should not be used for construction of sections having a plain and unimpeachable meaning. The Court's decisions further reveal that a statute having a plain meaning is not lightly to be found open to interpretation. *See, e.g., Patterson v. Shumate*, 112 S. Ct. 2242 (1992).

The plain meaning of Section 1129(b)(2)(B)(ii) is that holders of junior classes of claims and interests may not receive any property under a nonconsensual plan of reorganization unless the claims of all nonconsenting senior classes are paid in full. This meaning of the statute cannot be intrinsically or extrinsically impeached. First, the section's plain meaning does not conflict with another part of the Code. Second, the legislative history of the section confirms the plain meaning that, unless senior classes consent to the plan or are paid in full, no junior class can receive anything at all. 124 Cong. Rec. H11,105 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards). And third, there is no important, antagonistic, nonbankruptcy policy—or any other reason—that warrants going beyond the language of Section 1129(b)(2)(B)(ii) to determine the Code's meaning.

The only source of ambiguity allegedly found in Section 1129(b)(2)(B)(ii) is the meaning of the phrase "on account of." But this ordinary phrase has the simple, obvious, and salutary purpose of allowing persons who hold both a junior claim or interest and a senior claim to receive property in a nonconsensual reorganization with respect to the senior claim, though they are barred from receiving property on account of their junior claim or interest unless all objecting senior classes of claims are paid in full. The Ninth Circuit's reading of "on account of" as Congress' invitation to bankruptcy courts to analyze whether a plan gives property to old equity "primarily" because of its old interest or for "legitimate business reasons," *see* Pet. App. A41-42, should be rejected. Such interpretation finds no support in the Code, its history, or stated intent and would enmesh the courts in an area of economic issues, not legal principles, that Congress intended debtors and creditors to resolve between themselves.

Even if it were appropriate for the Court to refer to pre-Code practice to interpret Section 1129(b)(2)(B)(ii), the

changes in the plan confirmation process from the Bankruptcy Act to the Bankruptcy Code were so substantial that the Court would be justified in disregarding pre-Code practice in interpreting that section. *See Union Bank v. Wolas*, 112 S. Ct. 527 (1991). Congress has now codified the absolute priority rule in a strict form, *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1361, *reh'g and reh'g en banc denied* (7th Cir. 1990), and simultaneously eliminated the need for the new value exception, *Lumber Exch. Ltd. Partnership v. The Mut. Life Ins. Co. of N.Y. (In re Lumber Exch. Ltd. Partnership)*, 125 B.R. 1000, 1006-07 (Bankr. D. Minn. 1991). As a result of the debtor's enlarged powers under Chapter 11 of the Code, insinuating the new value exception into the Code would create an opportunity for self-dealing where none was present under the Bankruptcy Act, *In re A.V.B.I., Inc.*, 143 B.R. 738, 743 (Bankr. C.D. Cal. 1992), and would skew the careful balance that Congress struck between Chapter 11 debtors and creditors, *In re Greystone III Joint Venture*, 948 F.2nd 134, 144 (5th Cir. 1991) (withdrawn).

ARGUMENT

THE BANKRUPTCY CODE DOES NOT PERMIT A NEW VALUE EXCEPTION

Section 1129(b) can be literally applied to the facts of this case. Section 1129(b)(1) requires that a cram-down plan be "fair and equitable." Section 1129(b)(2) then specifies that: "the condition that a plan be fair and equitable . . . includes the following requirements: . . . the holder of any . . . interest that is junior to the claims of [an impaired class of unsecured claims] will not receive or retain under the plan on account of such junior . . . interest any property." *See supra* pp. 3-4. This language plainly forbids confirmation of a nonconsensual plan that allows the debtor's owners to retain their interests in the debtor if unsecured creditors are not paid in full. Because

the meaning of the statute is plain, and that plain meaning cannot be impeached by evidence of a contrary intent manifested either within or outside of the statute, the statute should not be construed to embody an inconsistent pre-Code practice.

I. Any Pre-Code Practice Recognizing the New Value Exception Is Irrelevant Unless the Plain Meaning of Section 1129(b)(2)(b)(ii) Can Be Intrinsically or Extrinsically Impeached

Construction of Section 1129(b) must begin with the language of the statute itself. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (both citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)). If the statute's language is plain, "'the sole function of the courts is to enforce it according to its terms,'" *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)), except "in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Id.* at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)) (alteration in original).

This Court has clearly *and consistently* articulated the circumstances under which pre-Code practice is relevant to Bankruptcy Code interpretation in a series of decisions commencing with *Midlantic Nat'l Bank v. New Jersey Dept. of Envtl. Protection*, 474 U.S. 494 (1986). These decisions firmly establish that unambiguous Code sections should be applied according to their terms, while ambiguous sections may be interpreted in light of well-recognized pre-Code practices. *See Ron Pair*, 489 U.S. at 242-45.

In *Midlantic* the debtor sought to abandon two properties containing hazardous wastes in violation of state

health and safety laws. 474 U.S. at 497-98. Section 554(a) of the Code purported to permit the abandonment: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." The Court refused to accept the text as dispositive of Congress' intent, noting that "when Congress enacted § 554, there were well-recognized restrictions on a trustee's abandonment power. In codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his abandonment power in violation of certain state and federal laws." *Id.* at 501. Although the Court did not end its analysis with the Code's text, it did not simply import into the statute the identified pre-Code practice. The Court explained with particularity the manner in which the literal application of Section 554 would conflict with other Code sections requiring the trustee to respect state and local laws designed to protect public health or safety, *id.* at 502-05, and would contradict Congress' goal of protecting the environment against toxic pollution, *id.* at 505-06.

The analysis in *Kelly v. Robinson*, 479 U.S. 36 (1986), followed a similar path. The issue in *Kelly* was whether a restitution obligation imposed as part of a state criminal sentence was dischargeable in Chapter 7 bankruptcy proceedings under Section 523(a)(7) of the Code. *Id.* at 53. First the Court noted that Congress enacted the Code against the backdrop of an established judicial exception to discharge for criminal sentences, including restitution orders. *Id.* at 43-46. Then the Court explained its "deep conviction" that bankruptcy courts should not invalidate the results of state criminal proceedings. *Id.* at 47. "This Court has emphasized repeatedly 'the fundamental policy against federal interference with state criminal prosecutions.'" *Id.* (citation omitted). The Court concluded that there was no evidence in the legislative

history to suggest that Congress intended to reverse such a fundamental policy. *Id.* at 50-53.

Three years later the Court reexamined the *Midlantic* and *Kelly* decisions in *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989). In *Ron Pair* the debtor's plan of reorganization provided for repayment without interest of the United States' tax lien on the debtor's property. *Id.* at 237. The United States objected to the plan on the grounds that the government was entitled to post-petition interest pursuant to Section 506(b) of the Code, which grants the holder of an oversecured claim "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." *Id.* The Court of Appeals for the Sixth Circuit overruled the government's objection in reliance on *Midlantic* and *Kelly*, observing that prior to enactment of the Code some courts had distinguished between consensual and nonconsensual liens for purposes of determining post-petition interest:

> We first reject the Government's contention that pre-Code law should not be relied on in interpreting section 506(b) since the provision appears to be unambiguous. While the language of a statute is always the starting point when its construction is at issue, it is only the starting point. As in [*Midlantic*] and [*Kelly*], pre-Code law should be reviewed in order to better understand the context in which the provision was drafted and therefore the language itself.

828 F.2d 367, 369-70 (6th Cir. 1987) (citation omitted). The Court of Appeals then embraced the pre-Code practice of denying post-petition interest on oversecured claims, reasoning that "if there is a well-established principle in bankruptcy law, we believe *Midlantic* and *Kelly* come into play, requiring

Congress to explicitly set forth its intention to deviate from the judicially created rule." *Id.* at 370 n.4.[9]

This Court reversed the Court of Appeals' decision and its rationale. The Court used *Ron Pair* to clarify the context and import of its decisions in *Midlantic* and *Kelly*:

> *Kelly* and *Midlantic* make clear that, in an appropriate case, a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code. But *Midlantic* and *Kelly* suggest that there are limits to what may constitute an appropriate case. Both decisions concerned statutory language which, at least to some degree, was open to interpretation. Each involved a situation where bankruptcy law, under the proposed interpretation, was in clear conflict with state or federal laws of great importance.

489 U.S. at 245. In contrast to the proposed applications of Section 554(a) and Section 523(a)(7) in those cases, the natural interpretation of Section 506(b) in *Ron Pair* did not conflict with any significant state or federal interest, or any other part of the Code. *Id.* Accordingly, the Court found "no reason to

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9 *Compare* Pet. App. A53 ("The Bankruptcy Code should not be read to abandon past bankruptcy practice absent a clear indication that Congress intended to do so.") (citing *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 563 (1990)).

suspect that Congress did not mean what the language of the statute says." *Id.*[10]

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10 Compare the analogous case of *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980), in which the respondents argued that the phrase "any other final action of the Administrator under [the] Act" in Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), meant less than what its words plainly implied. In support of their narrow interpretation of the Act, the respondents relied on the rule of *ejusdem generis* and the fact that Section 307(b)(1) specifically enumerated certain final actions of the Administrator. Respondents found further support in the silence of the legislative history, which they read as an indication that Congress did not intend the statutory phrase to be literally interpreted because a literal interpretation would radically expand the Courts of Appeals' jurisdiction.

The majority of the Court found a fundamental flaw in respondents' first argument: "'"The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty."'" *Id.* at 588 (citations omitted). Because the majority discerned no uncertainty in the meaning of the phrase "any other final action," *id.*, it refused to apply the *ejusdem generis* canon of construction, *id.* at 589. The majority also refused to read anything into Congress' silence:

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberation, that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Id. at 592 (footnote omitted).

Justices Rehnquist and Stevens both dissented from the majority decision, but in each case identified extrinsic grounds for doubting the plain meaning of the statute. For Justice Rehnquist, the plain meaning would have wrought a jurisdictional expansion "thoroughly inconsistent with the

(continued...)

The Court has consistently followed this approach to Bankruptcy Code interpretation and accorded the same weight to pre-Code practice articulated in *Ron Pair* in its subsequent decisions. In *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552 (1990) (criminal restitution obligations not dischargeable debts under Chapter 13), and *Union Bank v. Wolas*, 112 S. Ct. 527 (1991) (long-term debt can qualify for ordinary course of business exception to preference statute), as in *Ron Pair*, the Court refused to consider pre-Code practice in deciding the meaning of the Code sections at issue.[11] The only Supreme Court decision

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(...continued)

traditional role of appellate courts," resulting in a "massive shift in jurisdiction from the district courts to the courts of appeals." *Id.* at 600 (Rehnquist, J., dissenting). Similarly, Justice Stevens believed that the literal interpretation of the statute would lead to the extraordinary result that the Environmental Protection Agency would have "complete discretion to turn anything it chooses into final action reviewable only in the courts of appeals." *Id.* at 606 (Stevens, J., dissenting).

The positions of both the majority and the dissenters in *Harrison* are consistent with the Court's use of pre-Code practice described in *Ron Pair*. Like *ejusdem generis*, the presumption of continuity is merely an aid to the interpretation of statutes that are ambiguous, or the plain meaning of which has been drawn into question.

11 Some courts have taken the Court's caution in *Davenport* that "We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication the Congress intended such a departure," 495 U.S. at 563, as marking a return to the broad reading of *Midlantic* and *Kelly* exemplified by the Sixth Circuit's reading of those decisions in *Ron Pair*. *See, e.g.*, Pet. App. A53 n.31. These courts have failed to recognize, however, that in *Davenport* the Court concluded that "the statutory language plainly reveals Congress' intent," and refused to apply the *Midlantic/Kelly* principle. 495 U.S. at 563.

since *Ron Pair* to rely on pre-Code practice in interpreting the Bankruptcy Code is *Dewsnup v. Timm*, *id.* at 773 (1992).

In *Dewsnup* the Court considered whether Section 506(d) of the Code allows a Chapter 7 debtor to "stripdown" a creditor's lien on real property and limit the lien to the value of the collateral. *Id.* at 775. Section 506(d) provides that "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . ." According to the debtor/petitioner in *Dewsnup*, subsection (d) had to be read in light of Section 506(a), *id.* at 776, which states that "An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property."

The majority of the Court stated that it might have agreed with the debtor if it were "writing on a clean slate." *Id.* at 778. The majority observed, however, that "no provision of the pre-Code statute permitted involuntary reduction of the amount of a creditor's lien for any reason other than payment on the debt." *Id.* at 779. The Court concluded:

> [W]here the language is unambiguous, silence in the legislative history cannot be controlling. But, given the ambiguity here, to attribute to Congress the intention to grant a debtor the broad new remedy against allowed claims to the extent they become "unsecured" for purposes of § 506(a) without the new remedy's being mentioned somewhere in the Code itself or in the annals of Congress is not plausible, in our view, and is contrary to basic bankruptcy principles.

Id. Thus, although the Court did refer to pre-Code practice as a guide to interpretation of the Code in *Dewsnup*, which it refused to do in *Ron Pair*, *Davenport*, and *Wolas*, *Dewsnup* is in harmony with *Ron Pair* because the Court only turned to pre-Code practice as a guide *after* finding the statute open to interpretation. *Id.* at 777-79.

In contrast to Section 1129(b)(2)(B)(ii), Section 506(d) was open to interpretation for three legitimate reasons. First, the *Dewsnup* majority expressly found that Section 506(d) and its relationship to other provisions of the Code embraced ambiguities. 112 S. Ct. at 777. Unlike the words and phrases in Section 1129(b)(2)(B)(ii), the meaning of "allowed secured claim" in Section 506(a) is not transparent.[12] Second, the legislative history of Section 506(d) stated that "[Section 506](d) permits liens to pass through the bankruptcy case unaffected," H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 357 (1977), flatly contradicting the plain meaning of Section 506(d) proposed by the petitioner in *Dewsnup*. 112 S. Ct. at 779. Third, the proposed plain meaning would have reversed the long-recognized policy referred to in the House Report that liens created under state law should pass through bankruptcy unaffected (except in successful reorganizations). *Id.* Although this policy is reflected by pre-Code practice, it is actually a substantive *nonbankruptcy* policy of deference to state law that has constitutional ramifications. *See id.* (discussing unconstitutionality of Frazier-Lemke Act).

The approach used in these cases is a sound one that should be expressly reaffirmed—particularly in light of some courts' misreading of the *Dewsnup* decision as changing the

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12 The parties did not even agree on whether "allowed secured claim" was an indivisible compound phrase, as argued by the petitioner, or merely three separate words, as claimed by the respondents and the United States, as *amicus curiae*. *See id.*

process for construction of the Bankruptcy Code in light of pre-Code practice. *See, e.g.*, Pet. App. A110-15; *In re Snyder*, 967 F.2d 1126, 1129 (7th Cir. 1992); *In re Sovereign Group 1985-27, Ltd.*, 142 B.R. 702, 707 (E.D. Pa. 1992); *In re SLC Ltd. V*, 137 B.R. 847, 852-53 (Bankr. D. Utah 1992). The presumption of continuity between Code and pre-Code practice is merely a means for ascertaining Congress' intent, not an end in itself. In those cases where pre-Code practice has been decisive, it has been so "because it reflected policy considerations of great longevity and importance," *Ron Pair*, 489 U.S. at 245, not because practice under a prior statute is itself so important. Absent such underlying policies, there is no good reason why old laws and practices that Congress has superseded should be reinstated by the courts.[13]

II. The Meaning of Section 1129(b)(2)(B)(ii) Is Plain and Does Not Allow Any Exceptions To the Absolute Priority Rule

A. The Meaning of Section 1129(b)(2)(B)(ii) is Plain and Unambiguous

The language of Section 1129(b)(2)(B)(ii) is clear, using a combination of short, common words in their ordinary sense (holder, junior, receive, retain, under, any, property); words that are defined or have a clearly understood meaning in the Bankruptcy Code (claim, *see* § 101(5); interest, *see*

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13 As Justice Frankfurter explained, "Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose. Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bound of hints." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 535 (1947). In this case, the Ninth Circuit has erred by finding residues of pre-Code practice that are not implicit in the Code and purposes that are beyond the legislative intent. *See infra.*

§§ 501(a) & 101(16); plan, *see* §§ 1121-1129); the contextual phrase "such class"; and the common phrase "on account of." The phrase "such class" is clearly a reference to "a class of unsecured claims" in Section 1129(b)(2)(B). The phrase "on account of"—an ordinary phrase that should be given its ordinary meaning, *see Smith v. United States*, 113 S. Ct. 2050, 2054 (1993)—has been consistently defined in dictionaries of common usage for years before and after the Code's enactment in 1978. For example, the phrase was defined in 1949 as "For the sake of; by reason of," *Webster's New Collegiate Dictionary* 6 (6th ed. 1949), and again in 1981 as "for the sake of: by reason of: because of." *Webster's New Collegiate Dictionary* 8 (8th ed. 1981). None of the words in Section 1129(b)(2)(B)(ii) are ambiguous or susceptible to multiple interpretations in the context of the statute.

Section 1129(b)(2)(B)(ii) also employs simple grammar and transparent syntax. In some circumstances, plain words can be combined so as to produce a statute the meaning of which is not plain. *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting). In this case, however, the meaning of the words and phrases of the statute is no less clear when they are read together than when they are read in isolation.

As a result of the clear words, phrases and structure used, Section 1129(b)(2)(B)(ii) is susceptible to a single plain or natural meaning: Old equity and junior claim holders may not get or keep anything of value under a Chapter 11 plan unless all senior classes consent or are paid in full. The leading treatise on bankruptcy has adopted this plain meaning: "If a junior class contributes money's worth to the plan and is, thereby, permitted to receive any property or retain an interest, yet a senior class does not receive its full allowed claim, it would appear that the language of section 1129(b)(2) is not

met." 5 *Collier on Bankruptcy* ¶ 1129.03, at 1129-93 (Lawrence P. King ed., 15th ed. 1993).[14]

B. The Court of Appeals Rejected the Plain Meaning of Section 1129(b)(2)(B)(ii) Based on an Obvious Error

In its decision below, the Court of Appeals rejected the plain meaning of Section 1129(b)(2)(B)(ii) based in part on its mistaken belief that literal application of the statutory language would render the phrase "on account of such junior claim or interest" superfluous. *See* Pet. App. A40-41.[15]

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14 It is telling that the courts which abide by the dicta in *Case v. Los Angeles Lumber Prods. Co.* have long referred to the rule in that case as the new value *"exception," see, e.g., Official Creditors' Comm. ex rel. Class 8 Unsecured Creditors v. Potter Material Serv., Inc. (In re Potter Material Serv., Inc.)*, 781 F.2d 99 (7th Cir. 1986); *Anderson v. Farm Credit Bank of St. Paul (In re Anderson)*, 913 F.2d 530 (8th Cir. 1990), implicitly recognizing that any new value doctrine under the Bankruptcy Code would be an exception to the absolute priority rule. *See also Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988) ("There is little doubt that a reorganization plan in which [debtors] retain an equity interest in the farm is contrary to the absolute priority rule."). *But see* Pet. App. A42-43 & n.25 ("new value principle" an extrastatutory doctrine, not an exception to absolute priority rule) *and infra* pp. 28-29 (new value doctrine does not coexist with absolute priority rule).

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> Had Congress intended that old equity never receive any property under a [cramdown] reorganization plan where senior claim classes are not paid in full, it could simply have omitted the "on account of" language from section 1129(b)(2)(B)(ii). We would then be left with an absolute prohibition against former equity owners' receiving or retaining property in the reorganized debtor in such circumstances.

Pet. App. A40.

However, the "on account of" phrase serves the simple, obvious, and salutary purpose of allowing persons who hold *both* a junior claim or interest *and* a senior claim to receive property in a nonconsensual reorganization with respect to the senior claim, though they are barred from receiving property "on account of" their junior claim or interest unless all objecting senior classes of claims are paid in full. Had Congress codified the absolute priority rule in the manner suggested by the Ninth Circuit and omitted the "on account of" phrase (leaving the statute to read: "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan any property"), the holder of both a senior claim and a junior claim or interest would be barred from receiving any property under the plan "on account of" its senior claim—although other holders of senior claims could receive property under the plan. The "on account of" language appears to have been calculated to avoid this absurd result.[16] This Court recently underscored the importance of the often subtle distinction under the Code between the treatment of claims and holders of claims in *Nobelman v. American Sav. Bank*, 113 S. Ct. 2106, 2109-10 (1993) (distinguishing between "modification of claims" and "modification of the rights of holders of claims").

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16 The legislative history of Section 1129(b) confirms the simple purpose of the "on account of" phrase. *See infra* pp. 32-33.

C. The Court of Appeals' Interpretation of Section 1129(b)(2)(B)(ii) Is Untenable

The Court of Appeals recognized that "in some larger sense the reason that former owners receive new equity interests in reorganized ventures is that they are former owners." Pet. App. A38-39. The court went on to state that "it is also true that in new value transactions old equity owners receive stock in exchange for the additional capital they invest." *Id.* at A39. The court therefore sought the answer to the meaning of the statute "in the level of causation Congress had in mind when it prohibited old equity owners from receiving property 'on account of' their prior interests." *Id.* It concluded, without citing any direct authority, that "what Congress had in mind was direct or immediate causation rather than a more remote variety . . . ." *Id.* Specifically, the Court of Appeals believed that "Congress intended the 'on account of' phrase in section 1129(b)(2)(B)(ii) to require bankruptcy courts to determine whether a reorganization plan that gives stock to former equity holders does so primarily because of their old interests in the debtor or for legitimate business reasons." *Id.* at A41.

This alternative reading of Section 1129(b)(2)(B)(ii) is untenable. *Nothing* in Section 1129(b) or elsewhere in the Code supports the Court of Appeals' complex interpretation of the "on account of" phrase. The Ninth Circuit frankly admits that a textual search of the Code for a new value exception "dictates its own negative result because such a statutory exception does not exist." Pet. App. A43 n.25 (citation omitted). It seems unlikely that Section 1129 and Chapter 11, which are very detailed and specific, would provide for the new value exception so obliquely and require such an unusual inquiry into levels of causation as that proposed by the Ninth

Circuit without mentioning the exception or providing any guidance as to its scope.[17]

If the Court of Appeals' complex interpretation of "on account of" were correct, it also ought to apply to the other instances in which that phrase is used in Section 1129. For example, it should make sense to read Section 1129(b)(2)(B)(i) as stating: "[T]he plan provides that each holder of a claim of

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17 This Court rejected an argument similar to the Ninth Circuit's interpretation of "on account of" in *Regents of the Univ. of Cal. v. Public Employment Relations Bd.*, 485 U.S. 589 (1988). In the *University of California* case the Court examined the "private-hands" exception to the Private Express Statutes, 18 U.S.C. § 1696(c) (1984), which creates an exception to the government's postal monopoly for conveyance of letters by private hands "without compensation." The appellees argued that there would be no "compensation" for carrying certain letters sent through the University's internal mail system because the appellee/union would not pay the University specifically to carry the letters.

The Court observed that, while "compensation" is not defined in the Private Express Statutes, "Congress in no way qualified its reach. We therefore give effect to congressional intent by giving the language its normal meaning." *Id.* at 598. Based on the dictionary definition of "compensation" as an exchange of benefits or a quid pro quo, the Court determined that the appellees gave far too restrictive a reading to the term: "That term includes indirect as well as direct compensation." *Id.* at 600

The Ninth Circuit's distinction in this case between "direct or immediate causation" and "a more remote variety," Pet. App. A39, is the same as the distinction between direct and indirect compensation in the *University of California* case. Congress in no way qualified the reach of the "on account of" phrase in Section 1129(b)(2)(B)(ii), and the Court of Appeals has admitted (as it must) that "in some larger sense" the reason that former owners receive property under new value plans is that they are former owners. *Id.* at A38-39.

[a class of unsecured claims] receive or retain *primarily because of* such claim property of a value . . . equal to the allowed amount of such claim." But such a reading makes little sense and would complicate what is on its face a simple provision. The Court of Appeals has thus rejected a simple meaning of "on account of" that makes sense throughout Section 1129, including in Section 1129(b)(2)(B)(ii), in favor of a complex meaning that arguably might make sense in Section 1129(b)(2)(B)(ii), but fits the rest of the section rather poorly.

Allowing old equity holders to buy the reorganized debtor through a new value plan also would conflict with other sections of the Code. As the court explained in *In re Drimmel*, 108 B.R. 284 (Bankr. D. Kan. 1989), *aff'd*, 135 B.R. 410 (D. Kan. 1991), *aff'd on other grounds sub nom. Unruh v. Rushville State Bank*, 987 F.2d 1506 (10th Cir. 1993), new value exception plans of reorganization represent "a means to sell the property in question without meeting the Bankruptcy Code sales requirements of 11 U.S.C. §§ 363, 1123(a)(5)(D) and 1129(a)(11)." 108 B.R. at 290. *Accord Piedmont Assocs. v. CIGNA Property & Casualty Ins. Co.*, 132 B.R. 75, 80 (N.D. Ga. 1991).

D. The Ninth Circuit's Alternative Interpretation of Section 1129(b)(2)(B)(ii) Does Not Render the Section Ambiguous

The existence of the Court of Appeals' alternative interpretation of Section 1129(b)(2)(B)(ii) does not vitiate the conclusion that the section is susceptible only to the one *plain* meaning set forth above. Words and phrases rarely are so specific as to exclude possible secondary meanings; a statute capable of literal application therefore is not rendered ambiguous by its failure to foreclose other possible interpretations. *See Chisom v. Roemer*, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting). This Court has thus regularly

found and enforced the plain meaning of Bankruptcy Code sections that have riven lower courts and even divided the Court itself.

For example, in *Patterson v. Shumate*, 112 S. Ct. 2242 (1992), the Court granted certiorari to resolve a conflict among the Courts of Appeals for the Third, Fourth, Sixth, and Tenth Circuits, on the one hand, and the Fifth, Eighth, Ninth, and Eleventh Circuits, on the other, as to whether the phrase "applicable nonbankruptcy law" in Section 541(c)(2) of the Code encompasses relevant nonbankruptcy law, including federal law. *Id.* at 2246 & n.1. Despite the contrary interpretations of the Courts of Appeals, this Court unanimously held that the "plain language" of the Code dictated the answer to the issue. *Id.* at 2246; *accord Rake v. Wade*, 113 S. Ct. 2187 (1993) (applying "plain language of the Code" despite contrary interpretation by Third, Fourth, Ninth, and Eleventh Circuits).

E. The New Value Exception Is Not a Corollary to Section 1129(b)(2)(B)(ii)

Recognizing the absence of any textual support for the new value exception in the Code, the Ninth Circuit reasoned that the so-called "exception" is actually an extra-statutory corollary to the absolute priority rule better described as the "new value doctrine" or "new value principle." Pet. App. A43 & n.25; A3 n.1.

Whether the new value exception coexists with Section 1129(b)(2)(B)(ii) is a question of statutory construction, not a theoretical issue. "'It would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation.'" *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1150 (1992) (quoting *Sturges v. Crowninshield*, 4 Wheat 122, 202 (1819)). Because the "on account of" phrase is a simple

device for distinguishing between classes of claims, not a veiled invitation to conduct causal analysis, *see supra* pp. 23-27 and *infra* pp. 32-33, the Code flatly prohibits old equity from participating in a cramdown plan of reorganization. Accordingly, even if it were possible for courts to determine whether a plan gives old equity a stake in a reorganized debtor "primarily because of" such old interests, or "primarily because of" a new value contribution, *see* Pet. App. A39, the new value "corollary" would still be irrelevant. "Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end." *TVA v. Hill*, 437 U.S. 153, 194 (1978).

III. The Plain Meaning of Section 1129(b)(2)(B)(ii) Is Confirmed By Its Legislative History and Cannot Be Extrinsically Impeached

The *Midlantic* case is a useful example of the point recognized in *Ron Pair* that there are rare cases in which literal application of the Bankruptcy Code's plain language would produce a result demonstrably at odds with the intentions of Congress. Other evidence must therefore be examined to determine whether there is a substantial reason to doubt that the plain meaning of Section 1129(b)(2)(B)(ii) reflects Congress' intent. A review of the legislative history in this case, however, confirms that the plain meaning of Section 1129(b)(2)(B)(ii) is the intended meaning—and further refutes the survival of the new value exception.[18] Examination of the policy implications of literal application of Section 1129(b)(2)(B)(ii) also provides no reason to doubt the plain meaning of the statute.

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18 The history of the new value exception under the Bankruptcy Act, to the extent that it is relevant in this case, provides further support for the plain meaning of the section. *See* Brief of CBA and ABA as *Amici Curiae* in Support of Petitioner, Argument I.

A. The Plain Meaning of Section 1129(b)(2)(B)(ii) is Supported by the Legislative History of the Code

"There is no conflict between the literal language of section 1129(b)(2)(B) and the legislative history of that section." *In re Outlook/Century Ltd.*, 127 B.R. 650, 656 (Bankr. N.D. Cal. 1991). Like the Code itself, the House and Senate Reports on the Code and the statements of legislative leaders in the House Record and the Senate Record are silent with respect to the new value exception. Kenneth N. Klee, *Cram Down II*, 64 Am. Bankr. L.J. 229, 241 n.99 (1990). Even so, the legislative history of Section 1129(b) reinforces the implication of the text.

In the fullest available explanation of Congress' intent with respect to Section 1129(b)(2)(B)(ii), the sponsors of the Code state:

> [U]nder clause (ii), the court must confirm the plan if the plan provides that holders of any claims or interests junior to the interests of the dissenting class of impaired unsecured claims will not receive any property under the plan on account of such junior claims or interests. As long as senior creditors have not been paid more than in full, and classes of equal claims are being treated so that the dissenting class of impaired unsecured claims is not being discriminated against unfairly, the plan may be confirmed if the impaired class of unsecured claims receives less than 100 cents on the dollar (or nothing at all) *as long as no class junior to the dissenting class receives anything at all.*

124 Cong. Rec. S17,421 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini); 124 Cong. Rec. H11,105 (daily ed. Sept. 28, 1978) (remarks of Rep. Don Edwards) (emphasis added). Similarly, the House Report on the Code states:

> The general principle of the subsection permits confirmation notwithstanding nonacceptance by an impaired class if that class and all below it in priority are treated according to the absolute priority rule. The dissenting class must be paid in full before any junior class may share under the plan. . . .
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> . . . .
>
> The court may confirm over the dissent of a class of unsecured claims . . . only if the members of the class are unimpaired, if they will receive under the plan property of a value equal to the allowed amount of their unsecured claims, or if *no class junior will share under the plan.* That is, if the class is impaired, then they must be paid in full or, if paid less than in full, then *no class junior may receive anything under the plan.*

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 413 (1977) (emphasis added).

The House Report and sponsors' statements are not limited to an explanation of the particular language of the Code; they also explain and illustrate how the confirmation process is supposed to operate. Yet none of their explanations or illustrations makes any reference to the new value exception.

Also notably absent from these statements and the rest of the legislative history is any form of qualifying language, and particularly the "on account of" phrase that the Ninth Circuit invests with such importance. The legislative history thus confirms what the language—and the silence—of the Code plainly suggests: that Congress did not intend the new value exception to operate under the Code.

In addition to supporting the plain meaning of Section 1129(b), these statements subtly demonstrate the simple purpose of the "on account of" phrase by their *omission* of it. The omission suggests, first, that the phrase would have a readily understood meaning that did not require explanation, which is consistent with the literal or plain meaning of the statute. Second, the omission of the "on account of" phrase in each discussion of cramdown in terms of *classes* of claims rather than *holders* of claims suggests that the phrase is unnecessary in relation to classes of claims and interests, but that it is needed in relation to holders of claims and interests. The simple explanation for the "on account of" phrase makes sense of the omission.[19]

A precursor of the Code, S. 2266, 95th Cong., 2d Sess. (1977), as amended and reported on August 10, 1978, S. Rep. No. 95-1106, 95th Cong., 2d Sess. (1978), casts further doubt on the Ninth Circuit's interpretation of the "on account of" phrase. Section 1130 of S. 2266 ("Confirmation of plan") provided that a nonconsensual plan could be confirmed only if, with respect to each class that did not accept the plan, "the court shall have determined that a class of claims or interests is not entitled to receive or retain any

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19 On the other hand, there is no reason why the phrase would be less important in relation to classes of claims than to holders of claims if the phrase was intended, as asserted by the Ninth Circuit to determine the level of causation for old equity receiving property under a plan.

participation under the plan, and that no class on a parity with or junior to such class will receive or retain any participation under the plan." *Id.* § 1130(a)(9)(B). The Senate Report on S. 2266 explains: "[I]f a class of [nonaccepting] claims or interests is excluded from participation under the plan, the court may nevertheless confirm the plan if it determines that no class on a parity with or junior to such [class] participates under the plan." S. Rep. No. 95-989, 95th Cong., 2d Sess. 127 (1978).

Although the phrasing and stated intent of Section 1130 of S. 2266 and Section 1129 of the Code are similar, Section 1130(a)(9)(B), which speaks in terms of classes of claims and interests, includes no "on account of" language of any ilk.[20] If Congress truly intended the "on account of" phrase to require bankruptcy courts to determine whether a plan gives stock to old equity holders for legitimate or for improper reasons, *see* Pet. App. A41-42, one would expect either to find the phrase in Section 1130(a)(9)(B) or for there to be a statement in the legislative history of Congress' rejection of S. 2266's strict approach to absolute priority.

Finally, the complex interpretation of "on account of" as requiring courts to analyze primary and secondary causal

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20 Section 1130(a)(10), however, which speaks in terms of holders, includes the "on account of" phase: "The plan provides that each holder of a claim of a kind specified in section 507 of this title will receive, on account of such claim, property . . . of a value . . . equal to the allowed amount of such claim . . . ." S. 2266 § 1130(a)(10). This reinforces the implication drawn from the legislative history of Section 1129(b)(2)(B)(ii) that the "on account of" phrase is used to clarify sections that are cast in terms of holders of claims and interests, *not* as a signal to examine levels of causation. The use of the phrase in Section 1130(a)(10) also demonstrates that the Senate was familiar with the phrase and knew how to use it.

relationships between junior claims or interests, new value contributions, and property received or retained under a plan is suspect because such analysis would enmesh the courts in an area of economic issues, not legal principles, that Congress intended debtors and creditors to resolve between themselves.[21] "[T]he Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan which fails to honor the absolute priority rule." *Ahlers*, 485 U.S. at 207 (citation omitted).

B. The Plain Meaning of Section 1129(b)(2)(B)(ii) Is Not Contrary to Bankruptcy or Nonbankruptcy Policy

No "fundamental policy" or "extraordinary exemption from nonbankruptcy law" is implicated by the plain language of Section 1129(b)(2)(B)(ii), and literal application of the section has not produced a result "demonstrably at odds" with the presumed intentions of Congress. The Ninth Circuit theorized, however, that strict application of the absolute priority rule would impinge upon the perceived pro-reorganization policy of the Bankruptcy Code referred to in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), and *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). Pet. App. A71-76.

As a threshold matter, any pro-reorganization policy is purely a bankruptcy policy, which does not warrant interpretation of an unambiguous Code section. The policies

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21 In describing confirmation under the Bankruptcy Code, the House Report states that "The procedure followed is simple." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 414 (1977). The new value exception has not proved easy to apply, however, and would significantly complicate the confirmation process. *See* Brief of the CBA and ABA as *Amici Curiae* in Support of Petitioner, Argument III.B.

involved in the *Midlantic*, *Kelly*, and *Dewsnup* cases, by contrast, were substantive nonbankruptcy policies of great longevity and importance. It is appropriate to accord great weight to nonbankruptcy policies, but little weight to bankruptcy policies embodied in the Code itself, in considering whether Congress meant what it said in the Code. Congress is unlikely to have failed to apprehend that a section of the Code would contradict the purpose of the Code, though it might fail to realize the effect of the Code on other policies.

Even if a competing bankruptcy policy might warrant looking beyond the plain language of the Code, the Court should refuse to do so in this case.

First, this Court has held that Congress sought a balance of creditors' and debtors' rights under the Bankruptcy Code, not to favor debtors in all disputes. "[T]he Bankruptcy Reform Act consolidated three reorganization chapters of the former Bankruptcy Act into a single business reorganization chapter, with the intention that business reorganizations should be quicker and more efficient and provide greater protection to the debtor, creditors, and the public interest. *See* H.R. Rep. No. 95-595, p. 5 (1977)." *Bildisco*, 465 U.S. at 517 n.1. In *Bildisco* this Court expressly recognized that creditors' interests must be balanced against the debtor's interests and those of other affected parties for a successful reorganization. *Id.* at 527.

The Ninth Circuit's justification for the new value exception also fails on the policy level because strict application of the absolute priority rule in cramdowns does not impair, or even necessarily implicate, debtors' ability to reorganize. New value plans are confirmed with creditors' consent every day. *In re A.V.B.I., Inc.*, 738, 743 (Bankr. C.D. Cal. 1992). Conversely, old equity has a fiduciary duty to protect the interests of the estate, including the interests of creditors as well as equity holders, *Pepper v. Litton*, 300 U.S.

295, 307 (1937), that surely extends to promoting reorganizations whether or not old equity is given a new equity stake in the enterprise. The dispute over the new value exception is thus actually grounded in allocation issues, not reorganization.

As Professor Nimmer explains, "The new value concept is a loss allocation rule" that increases old equity's influence at creditors' expense. Raymond T. Nimmer, *Negotiated Bankruptcy Reorganization Plans: Absolute Priority and New Value Contributions*, 36 Emory L.J. 1009, 1052 (1987).[22] Professor Warren recognizes this fact and that reorganizations will take place in most cases with or without either cramdown or the new value exception. Elizabeth Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9, 31-32 (1992). She is opposed to prohibiting old equity from participating in the reorganized debtor pursuant to a strict rule of absolute priority, however, because it "would cause some reorganizations to fail when bargaining breaks down because some creditors overvalue their holdout potential." *Id.* at 32.

Professors Douglas G. Baird and Thomas H. Jackson anticipated and rejected this justification for the new value exception in *Bargaining After the Fall and the Contours of the Absolute Priority Rule*, 55 U. Chi. L. Rev. 738 (1988): "[N]otwithstanding the costs that everyone suffers if the bargaining breaks down, the bilateral negotiations that follow a default are useful." *Id.* at 755.

> One might argue that this conclusion omits the costs of the bargaining process and their potential to lead to the failure of the Firm

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22 According to Nimmer, the "primary objective" of bankruptcy is loss allocation. *Id.* at 1010.

> as a going concern. One function of bankruptcy law, the response would continue, is to ensure that the failure of even a single creditor and a debtor to reach a bargain that made them both better off would not lead to dismembering of a firm. Bankruptcy, under this view, is a form of binding arbitration that protects the value of the secured creditor's interest and ensures that firms that have a going-concern surplus stay in business.
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> This argument seems both normatively and descriptively wrong, however. . . .
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> . . . .
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> Although a bargaining impasse might lead to a socially undesirable outcome, neither bankruptcy law nor the absolute priority rule seems an appropriate response to the problem.

Id. at 756, 758.

Bankruptcy should not be used to solve bargaining failures. But if it were, no one knows how many reorganizations might be saved by allowing judges to second-guess the judgment of creditors whom they believe have overvalued their holdout potential. Significantly, however, there is not one reported case of a new value plan being confirmed under the Bankruptcy Act. John D. Ayer, *Rethinking Absolute Priority After* Ahlers, 87 Mich. L. Rev. 963, 1016 (1989); Kenneth N. Klee, *Cram Down II*, 64 Am. Bankr. L.J. 229, 241 (1990). The impact of the new value exception on the allocation of the "reorganization premium," on the other hand, would be felt in every case because of its effect on the parties' leverage. Warren, *supra*, at 10; Nimmer, *supra*, at 1052.

Assuming that the new value exception would promote reorganizations and that its loss allocation effects were tolerable, it still is by no means clear that allowing new value reorganizations to be crammed down on creditors would prevent the kind of social and economic dislocations that Congress sought to avoid through Chapter 11. "The argument that protecting employees, suppliers or local communities justifies harming creditors . . . should not be lightly accepted and often should be simply disregarded." Nimmer, *supra*, at 1058. "Owners here claim protection as surrogates, but their interests diverge from those of the dependents. Treating the owners as surrogates may convey value to them without benefiting the dependents." *Id.* at 1059.

Although Professor Nimmer was particularly concerned about this problem in the case of publicly held corporations, where there is the greatest divergence between old equity and dependents, the same divergence is true in the case of single-asset debtors like Bonner. The new value problem has been most acute in cases like this involving "single asset" debtors—owners of a mall, an office building or complex,[23] an apartment building,[24] or a farm.[25] 5 *Collier on Bankruptcy*

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23 *E.g.*, *Greystone*, 995 F.2d 1274; *Travelers Ins. Co. v. Bryson Properties, XVIII (In re Bryson Properties, XVIII)*, 961 F.2d 496 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992); *Prudential Ins. Co. v. F.A.B. Indus. (In re F.A.B. Indus.)*, 147 B.R. 763 (C.D. Cal. 1992), *appeal docketed*, No. 93-55055 (9th Cir. Jan. 13, 1993); *In re SLC Ltd. V*, 137 B.R. 847 (Bankr. D. Utah 1992)).

24 *E.g.*, *In re Montgomery Court Apartments, Ltd.*, 141 B.R. 324 (Bankr. S.D. Ohio 1992); *Penn Mutual Life Ins. Co. v. Woodscape Ltd. Partnership (In re Woodscape Ltd. Partnership)*, 134 B.R. 165 (Bankr. D. Md. 1991); *In re Bjolmes Realty Trust*, 134 B.R. 1000 (Bankr. D. Mass 1991).

25 *E.g.*, *Ahlers*, 485 U.S. 197; *Snyder v. Farm Credit Bank of St. Louis (In re Snyder)*, 967 F.2d 1126 (7th Cir. 1992);

¶ 1129.03[4][e][i], at 1129-93. In such cases the asset will not liquidate the way a business might: it will merely change hands.[26] This case is emblematic of the divergence problem in that the Mall has long been managed by an independent property manager, not Bonner or its employees (it has none), and will continue to stay open irrespective of whether Bonner Properties or U.S. Bancorp owns it.

Ultimately, whether a given reorganization should go forward is a question that Congress left to be decided by creditors, not the courts. The contrary argument advanced by the Ninth Circuit—that new value plans should be favored because they promote all parties' interests through reorganization—is the same claim made by the debtors and rejected by this Court in *Ahlers*. "The Court of Appeals may well have believed that petitioners or other unsecured creditors would be better off if respondents' reorganization plan was confirmed. But that determination is for the creditors to make in the manner specified by the Code." 485 U.S. at 207 (citation omitted).

(...continued)

Anderson v. Farm Credit Bank of St. Paul (In re Anderson), 913 F.2d 530 (8th Cir. 1990).

26 *See* Brief of the American Council of Life Insurance and Mortgage Bankers Association of America (hereinafter, the "ACLI and MBAA") as *Amici Curiae* in Support of Petitioner at 3-4.

IV. The Bankruptcy Code Changed the Confirmation Process So Fundamentally That Pre-Code Practice Should Be Disregarded

The presumption of continuity of pre-Code practice should not always apply with equal force. Where the need for an old exception dies, its ghost should not haunt the interpretation of subsequent statutes. In this case, even if Section 1129(b) did not unambiguously foreclose the new value exception, the fundamental change in the confirmation process wrought by enactment of Chapter 11 warrants disregard of pre-Code practice as a guide to interpretation of Section 1129(b).

In *Midlantic* the Court properly invoked the presumption of continuity in interpreting the trustee's abandonment power because nothing in the enactment of the Bankruptcy Code had altered the appropriateness of the trustee's adherence to state and local health and safety laws. To the contrary, affirmative evidence in the Code indicated that pre-Code practice retained its vitality. *See supra* p. 14. Similarly, in *Kelly* there was no reason to believe that Congress intended to allow bankruptcy courts to remit state criminal judgments under the Code.[27] And in *Dewsnup*, the principle that liens created under state law should pass through bankruptcy unaffected was as sensible in 1978 as it was when *Long v. Bullard*, 117 U.S. 617 (1886), was decided.

But where only bankruptcy interests are at stake and Congress completely rewrites the law, the presumption of continuity is unwarranted. "Importing concepts from past reorganization cases into interpretation of the Code must be done gingerly, with proper attention to the context in which

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27 In *Davenport*, on the other hand, the statutory language was so clear that it supported departing from pre-Code practice. *See supra* p. 18 & n.11.

the original case arose." *In re A.V.B.I.*, 143 B.R. 738, 746. This point is demonstrated by the Court's decision in *Union Bank v. Wolas*, 112 S. Ct. 527 (1991), *rev'g In re CHG Int'l, Inc.*, 897 F.2d 1479 (9th Cir. 1990), which underscored the primacy of the Code's plain language over pre-Code practices.

The *Wolas* case involved the Code's "preference" statute and the ordinary course of business defense thereto. Section 547(b) authorizes a trustee to avoid as preferences certain transfers made by a debtor within 90 days before bankruptcy. Preferences also were avoidable by a trustee under the Bankruptcy Act, but the analogous section of the Bankruptcy Act (Section 60, 11 U.S.C. § 96 (1978) (repealed 1979)) did not specifically include an exception for payments made in the ordinary course of business. Instead, courts had developed an exception known as the "current expense" rule to cover payments on the eve of bankruptcy that did not diminish the net estate. 112 S. Ct. at 531. By comparison, as originally enacted in 1978, Section 547(c) of the Code provided in relevant part: "'the trustee may not avoid under this section a transfer— . . . (2) to the extent that such transfer was— (A) in payment of a debt incurred in the ordinary course of business . . .; (B) *made not later than 45 days after such debt was incurred* . . . .'" *Id.* at 530 n.8. In 1984, Congress deleted the italicized language from Section 547(c). *See id.* at 530-31 & n.8.

The debtor in *Wolas* argued, among other things, that Congress intended to codify the judicially created current expense exception under the Bankruptcy Act when it enacted Section 547(c)(2), and therefore the Court should construe the ordinary course of business exception as limited to the confines of that rule. *Id.* at 531. This Court unanimously rejected the debtor's arguments based on the plain language of the statute and the lack of extrinsic evidence indicating an intent to codify the current expense rule. *Id.* at 531-32. The Court then noted

that there had been a number of changes to the preference statute since the current expense rule was adopted:

> The current expense rule developed when the statutory preference provision was significantly narrower than it is today. . . . When Congress rewrote the preference provision in the 1978 Bankruptcy Code, it substantially enlarged the trustee's power to avoid preferential transfers . . . . At the same time, Congress created a new exception for transfers made in the ordinary course of business. . . .
>
> In light of these substantial changes in the preference provision, there is no reason to assume that the justification for narrowly confining the "current expense" exception to trade creditors before 1978 should apply to the ordinary course of business exception under the 1978 Code. Instead, *the fact that Congress carefully reexamined and entirely rewrote the preference provision in 1978 supports the conclusion that the text of § 547(c)(2) as enacted reflects the deliberate choice of Congress.*

Id. at 532 (citations and footnote omitted; emphasis added).

The same principle applies in this case. With the enactment of the Code, Congress changed the confirmation process even more dramatically than the preference statute.

> Chapter 11 under the Bankruptcy Code reflects a melding of concepts derived from several distinct bodies of pre-Code law . . . . The conscious purpose expressed in the legislative history was to create a new chapter that represented the best of all these approaches to reorganization. In other words, Chapter 11 was intended to be different from its pre-Code ancestors.

A.V.B.I., 143 B.R. at 746-47.

A. The Bankruptcy Code Defines What Is "Fair and Equitable"

It is no longer appropriate for judges to apply the new value exception in the exercise of their "informed discretion concerning the practical adjustment of the several rights," *Kansas City Terminal Ry. Co. v. Central Union Trust Co.*, 271 U.S. 445, 455 (1926), because the Code replaced the judicially developed fair and equitable standard with a statutory definition.[28] "Everything changed with the adoption of the Code in 1978. The definition of 'fair and equitable' is no longer a matter of common law; § 1129(b)(2) defines it expressly." *Kham & Nate's Shoes No. 2*, 908 F.2d at 1361; *accord Outlook/Century*, 127 B.R. at 657; *In re Winters*, 99 B.R. 658, 663 (Bankr. W.D. Pa. 1989). "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Ahlers*, 485 U.S. at 206.

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28 This is not to say that the "fair and equitable" language in Section 1129(b)(1) does not continue to constitute a separate requirement that a plan must satisfy—beyond the specific requirements set forth in Section 1129(b)(2)—in order to be crammed down on unconsenting classes of creditors. For the reasons argued by the United States in its *amicus* brief, U.S. Bancorp believes that the "fair and equitable" standard in Section 1129(b)(1) presents an independent basis for rejecting any new value "exception" under the Code: a plan allowing participation by old equity owners over the objections of unpaid creditors is not "fair and equitable."

B. The Bankruptcy Code Liberalized the Confirmation Process, Obviating the Need for a New Value Exception

As explained in *Lumber Exch. Ltd. Partnership v. The Mut. Life Ins. Co. of N.Y. (In re Lumber Exch. Ltd. Partnership)*, 125 B.R. 1000 (Bankr. D. Minn. 1991):

> Under the *Bankruptcy Act*, a plan could be confirmed only if it was "fair and equitable" *to each dissenting creditor*. . . .
>
> . . . .
>
> The *Bankruptcy Code* refocused the concept "fair and equitable" away from dissenting *creditors* and onto dissenting *classes*. . . . Application of absolute priority rule exceptions to creditor members of a *rejecting* class was never discussed in cases decided under the *Bankruptcy Act*. In fact, the required finding of fair and equitable was applicable only to the dissenting minority creditors belonging to an *accepting* class.
>
> Class acceptance by requisite percentage approval, and a finding of "fair and equitable" regarding minority dissenting creditors of the same class, were both required to obtain confirmation under the *Bankruptcy Act*. Accordingly, the absolute priority rule was not applicable to a rejecting class. Class acceptance was a condition precedent to application of the rule.

> . . . [I]t is by no means certain that the "new value" exception to absolute priority, when considered with respect to a rejecting *class* under the *Code*, would measure the same equitable strength as when applied to *individual dissenters* of an accepting class under the *Bankruptcy Act*. . . . As used under the *Act*, the exception did not collide with the absolute priority rights of the *class*. Application of the exception under the *Code* would eviscerate those rights.

Id. at 1006-07 & n.10 (citations omitted). As a result of this liberalization, the new value exception is not needed under the Code. "Holdouts that spoiled reorganizations and created much of the motive for having judges 'sell' stock to the manager-shareholders no longer are of much concern, now that § 1126(c) allows the majority of each class (two-thirds by value) to give consent." *Kham & Nate's Shoes No. 2*, 908 F.2d at 1361.[29] "*Consensual* 'new value' plans involving cash infusions by existing management or equity are an extremely common and effective means of resolving chapter 11 cases." *A.V.B.I.*, 143 B.R. at 743.

Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106 (1939), illustrates this point. The petitioners in *Los Angeles Lumber* were the holders of just over 7% of a class of the debtor's bonds. They objected to the debtor's plan on the grounds that it was not fair and equitable to bondholders, even though the holders of almost 93% of the bonds had consented

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29 The *amicus* brief of the CBA and ABA further explains that the new value exception under the Act was created and used for the benefit of majority/consenting creditors—not by old equity. *See* Brief of CBA and ABA as *Amici Curiae* in Support of Petitioner, Argument I.B.

to the plan. *Id.* at 112.[30] If the *Los Angeles Lumber* plan were before the Court today, it could be confirmed without resort to the cramdown provisions of Section 1129(b). *Outlook/Century*, 127 B.R. at 657.[31]

C. The Code Enlarged the Powers of Debtors' Management and Owners

One reason why the new value exception was less troubling under the Bankruptcy Act was that old equity holders had far less ability to abuse the exception under the Act than they have under the Code. As the court explained *In re A.V.B.I.*:

> Perhaps the key difference between the Code's chapter 11 and the statutory context of

30 The district court confirmed the plan and approved the issuance of new common stock to the old equity holders on the grounds, among others, "that they had furnished the bondholders certain 'compensating advantages' or 'consideration'" in the form of "'their familiarity with the operation' of the business and their 'financial standing and influence in the community'; and because they can provide a 'continuity of management.'" *Id.* at 112-13 (quoting the district court). The Court of Appeals for the Ninth Circuit affirmed the decision without reaching the merits of the case. *Id.* at 113. This Court reversed, recognizing the new value exception in dicta, but holding that the contribution of new value must be "in money or in money's worth," *id.* at 122, and that the debtor's plan did not satisfy that standard.

31 The same is true of the other cases cited by the Court of Appeals at Pet. App. A27 in which this Court has adverted to a new value exception. *See Mason v. Paradise Irrigation Dist.*, 326 U.S. 536 (1946) (owners of 92% of bonds assented to new value plan); *Marine Harbor Properties, Inc. v. Manufacturer's Trust Co.*, 317 U.S. 78 (1942) (over two-thirds of certificate holders consented to readjustment plan).

> the *Los Angeles Lumber* case is the debtor in possession concept and its implications. All Section 77B cases had court-appointed trustees in place: the debtors did not control the management of the company during the administration of the case. By contrast, under the Bankruptcy Code, chapter 11 cases overwhelmingly are operated by debtors in possession. Thus, a "new value" exception under Section 77B might have appeared obviously unobjectionable to the Supreme Court in *Los Angeles Lumber* because equityholders would only be allowed to buy back into the management of the company, after a trustee had been in place. . . . On the other hand, in a chapter 11 debtor in possession case, a "new value" exception permits uninterrupted control by insiders.

143 B.R. at 743. This change creates a potential for abuse of the new value exception unlike any under the Bankruptcy Act.[32]

D. The New Value Exception would Skew the Code's Balance between Debtors and Creditors by Injecting the Courts into Disputes that Congress Left to the Parties

The new value exception is entirely inconsistent with Congress' careful realignment of creditors' rights and powers under Section 1129(b). "A 'new value exception' means a power in the *judge* to 'sell' stock to the managers even when

32 *See* Brief of the ACLI and MBAA as *Amici Curiae* in Support of Petitioner at 18-20.

the creditors believe that this transaction will *not* augment the value of the firm." *Kham & Nate's Shoes No. 2*, 908 F.2d at 1360.

> [P]ermitting the courts, pursuant to a "new value exception," rather than the creditors, under a strict absolute priority rule, to determine the conditions of former equity owners' participation in a reorganized debtor introduces an enormously complicating factor in a carefully balanced bargaining structure. . . . Creditors and the debtor [would be] left to guess, *not what each other's* "bottom line" *position is* for a consensual plan, *but rather what the particular court sees* as a "bottom line" cash contribution that will permit cramdown of an old equity plan under the "new value exception." . . . Negotiations between creditors and the debtor against such a "new value exception" backdrop would be enormously skewed in favor of old equity and would seriously erode the utility of the creditors' votes.

In re Greystone III Joint Venture, 948 F.2d at 144 (withdrawn). But "the Code provides that it is up to the creditors—and not the courts—to accept or reject a reorganization plan which fails to honor . . . the absolute priority rule." *Ahlers*, 485 U.S. at 207 (citation omitted).

* * *

In light of these substantial changes, reliance on pre-Code confirmation practices would be unwarranted in this case, even if Section 1129(b) were open to interpretation. The Court therefore should follow its reasoning in *Union Bank v.*

Wolas and refuse to use pre-Code practice as a guide to the meaning of Section 1129(b)(2)(B)(ii).[33]

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the decision of the Bankruptcy Court and order granting U.S. Bancorp relief from the automatic stay to foreclose on the Mall should be reinstated.

Respectfully submitted,

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33 In the alternative, the decision below should be reversed because, as the United States and the ACLI and MBAA explain in their *amicus* briefs, Bonner's Plan violates Section 1129(b)(2)(B)(ii) by giving Bonner's owners an exclusive right to acquire the common stock of Bonner Properties.